IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3957 OF 2007

Ashta Lokmanya Nagari Sahakari
Patsanstha Maryadit .. Appellant

Versus

Ganesh Coop.Spinnuing Mill Ltd. .. Respondent

Mr.A.B.Vagyani for appellant
Mr.Tejpal Ingale for respondent.

CORAM : S.C.DHARMADHIKARI, J.
DATE : 1st August 2007.

P.C.

. Rule. Respondents waive service. Rule is made returnable forthwith by consent. Heard

parties.

2. This petition under Article 227 of the Constitution of India challenges an order below Exh.1 in Special Darkhast No.20 of 2006.

3. Petitioner had succeeded in the case filed by it in Cooperative Court at Kolhapur, being S.C.C. Suit No.887/99 wherein an Award is made in favour of the petitioner against respondents in the sum of Rs.25 lakhs on 3rd April 2006. That amount has been directed to be paid along with interest at 18% p.a.

4. It is not necessary to burden this petition with further facts inasmuch as respondent has preferred an appeal to the Coop.Appellate Court against the subject award, which is pending. Petitioner also is aggrieved by part of the Award and it has also approached Coop.Appellate Court. Both appeals are pending.

However, it is pertinent to note that in the appeal preferred by the respondent - judgement debtor, there is no stay of the execution proceedings.

5. It is in such circumstances, that the execution proceedings were commenced. The subject decree/award was filed in the Competent Court and, thereafter, a Precept was issued as the immovable property was within the jurisdiction of the Court of Civil Judge, Senior Division, Ichalkaranji. In such circumstances, decree came to be transferred for execution to the Court of Civil Judge Senior Division, Ichalkaranji.

6. When the decree was sought to be executed an application was filed being Exh.1 on behalf of respondents. That application prayed for suspension of the execution proceedings. In the submission of the judgement debtor, the execution

proceedings cannot proceed because the immovable properties of the judgement debtor have been mortgaged to Maharashtra State Coop.Bank (Bank for short) and that mortgage would take precedence over the award in favour of the present petitioner. In such circumstances, the Court was approached with a request for suspension of the execution proceedings. That request has been granted and that is how the decree holder - petitioner is before me invoking the writ jurisdiction.

7. I have heard Mr.Vagyani and Mr.Ingale at length.

8. I have perused with their assistance, the petition, affidavit in reply and annexures thereto including the impugned order. I have also perused with their assistance the provisions of C.P.C. insofar as they are material for the purpose of present petition.

9. The Court below was influenced by the fact that during the course of proceedings before the Coop.Court, there was interim relief of Injunction and Attachment of the properties of the Judgement debtor. However, that order of injunction and attachment before the judgement either was not cotinued or vacated subsequently. The documents that were produced before the Court below demonstrate that the immovable properties have been mortgaged with the Bank in 1992 that is prior to the date of award and that mortgage/award is still subsisting. The Bank has moved appropriate authority for auction under the Securitisation Act. This submission was accepted by the courts below despite observing as under:-

> ". No doubt, this D.H. has no concern with the same mortgage etc. being stranger. If on looking it from the angle of cooperative bank the D.H.

will be in the same position. Because, the cooperative bank was not party to the proceedings before coop.court. But, fact remains as it is that the properties in question were already mortgaged in favour of Maharashtra Coop.Bank. Therefore, obviously, they have got prior claim over the property. Under such circumstances, I am of the view that warrant of attachment of the movables and immovables shall not be issued. At the most D.H. will approach before competent authority requesting to include their claim so as to get priority next to that of coop. bank. Unless and until the properties are being released from mortgage I do not find it proper to issue warrant about the attachment of the same, when the properties have been already mortgaged. Hence, I proceed to pass following order".

10. In the opinion of the Court below the decree holder is stranger to the proceedings between judgement debtor and the Bank but the priorities have yet to be decided. Hence, warrant of attachment cannot be issued, unless the properties are released from mortgage. On this reasoning the subject order has been passed.

11. I have perused the provisions relevant for the purpose of enabling the executing court to stay the execution proceedings. Order XXI Rule 26 of C.P.C. provides for staying of execution proceedings. Both sides do not dispute that execution proceedings could not have been stayed under the said Order in the facts and circumstances of the present case. Similarly, both sides do not dispute that attachment of the immovable property in execution is permissible and merely because there is a mortgage or prior charge there is no impediment in doing so. When

attention of Mr.Ingale was invited to Order XXI Rule 54 read with Order XXI Rule 58(3), he could not dispute that Attachment can be levied even if there is prior charge or mortgage of the Bank.

12. The Court below was, therefore, in clear error in passing the impugned order. The said order is neither traceable to the inherent powers of the Court nor the one enabling it to stay execution proceedings. The Court has clearly proceeded on a misconception in law that because the properties are mortgaged in somebody else's favour, stranger to that proceedings, cannot execute the decree for money passed in his or her favour by Attaching the same. That this is misconception is clear from a perusal of the abovementioned provisions in law.

12. In the above facts and circumstances, in my opinion the impugned order suffers from an

error apparent on the face of the record and is wholly unsustainable. The grounds on which the execution proceedings have been suspended are untenable in law. Reasons are unsupportable on the touchstone of any legal provisions including inherent powers of the executing court. In this view of the matter, I would be failing in my duty if I decline to interfere with the impugned order in my jurisdiction under Article 227 of the Constitution of India.

13. For the reasons aforesaid, writ petition succeeds. Rule is made absolute in terms of prayer clause (b). However, it is clarified that all contentions of the petitioner as well as respondents with regard to the enforceability of the decree are kept open. Court below shall proceed with the execution proceedings in accordance with law.

(S.C.DHARMADHIKARI, J)